

United States District Court
Southern District of Texas

ENTERED

October 04, 2017

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FREEDOM FROM RELIGION
FOUNDATION, INC., JANE DOE,
JOHN ROE, and JANE NOE,

Plaintiffs

V

CIVIL ACTION NO. H-17-881

JUDGE WAYNE MACK, and
MONTGOMERY COUNTY, TEXAS

Defendants

ORDER

Plaintiffs' First Amended Complaint does not specify whether Defendant Judge Wayne Mack is sued in his personal capacity or official capacity, or both. Judge Mack in his motion to dismiss raises defenses of judicial immunity and qualified immunity that are inapplicable if Plaintiffs have sued him only in his official capacity. See Kentucky v. Graham, 105 S. Ct. 3099, 3105-06 (1985). Plaintiffs respond to these defenses on the merits, but then also argue that qualified immunity is available only to officials sued in their personal capacities and "[b]ecause Judge Mack has been sued in his official capacity, the defense of qualified immunity is not available to him."¹ This response permits an inference that Plaintiffs intend not to sue Judge Mack in his personal capacity, but only in his official capacity. To remove any ambiguity

¹ Document No. 28

regarding the capacity in which Plaintiffs have intended to sue Judge Mack, Plaintiffs are requested within seven (7) days after the date of this Order to file notice stating whether their claims are against Judge Mack only in his official capacity or also in his personal capacity. No further briefing on Defendants' motions to dismiss is required at this time.

It is SO ORDERED.

The Clerk will enter this Order, providing a correct copy to all counsel of record.

SIGNED in Houston, Texas, this 3rd day of October, 2017.



EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE